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No. 80-2160

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LORRAINE A. WILLIAMS and CHARLES E. WILLIAMS, on behalf of themselves and on behalf of the congregation of the MT. JEZREEL BAPTIST CHURCH, a District of Columbia corporation,

Petitioners,

v.

AULIN E. JOHNSON, BALIS A. DUNLAP, Jr., GEORGE A. BROWN, JOHN A. DAVIS, ANDREW T. FLEMING, ROBERT HAIGLER, NELSON C. MALONE, YVONNE SMITH, ELDRIDGE SPEARMAN, WILLIAM SWANN and BERNARD A. WADE, individually and as trustees of the MT. JEZREEL BAPTIST CHURCH, and HAROLD E. TRAMMELL, pastor,

Respondents.

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI

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THE TRIAL COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS (1) IN DENYING SUMMARY JUDGMENT FOR AN ACCOUNTING BASED ON THE FIDUCIARY RELATION

EXISTING BETWEEN THE PARTIES; (2) IN MOOTING A TIMELY DISCOVERY MOTION (THAT HAD BEEN PENDING DETERMINATION SIX MONTHS) BY THE *SUA SPONTE* DISMISSAL OF PETITIONERS' CLAIM FOR AN ACCOUNTING, AND (3) IN REQUIRING THAT PETITIONERS PROVE THE FRAUD GROUND OF THE CLAIM PRIOR TO TRIAL. SANCTION OF THE TRIAL COURT'S PROCEDURE BY THE COURT BELOW CALLS FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

1. In their attempt to justify the *sua sponte* dismissal of petitioners' accounting suit, respondents rely entirely on the trial judge's treatment of the discovery motion filed January 16, 1979, to compel disclosure of the Church's tax returns as "totally frivolous" and his conclusion that "petitioners did nothing for nine months" between March 7, 1978, when their motion for summary judgment was denied, and January 16, 1979, when the discovery motion was filed. (The docket sheets, Record, 972-980, show that during that period petitioners took testimony on oral deposition in June, July, and October of 1978.)

At the very first status hearing on July 5, 1977, when petitioners reported that respondents failed to produce the Church's books of account for inspection, respondents indicated that all of the day care center records had been turned over to the IRS and that other financial records of the Church had been misplaced. The trial judge then suggested that the respondent-trustees be deposed and asked to explain on the record what happened to each category of records sought. At the same time, the trial judge suggested that the deposition of IRS personnel be taken in an anteroom of his courtroom so that he could be available to rule on objections

to disclosure of the Church's tax returns and return information. Petitioners followed the suggested procedure.

Revenue Officer Elmer Matthews appeared for the taking of his deposition on November 27, 1977, at which time the trial judge was on hand. However, none of the respondents attended. Their counsel of record was present but without authority to consent to disclosure of the records of the Church and its wholly-owned day care center. He did produce a power of attorney given him by the manager of the day care center, whereupon the IRS turned over the TDA (taxpayer delinquent account) file of the day care center and the 100-percent penalty file of the manager. (Record, 565-570.)

Therafter on May 3, and May 16, 1978, IRS produced the same files for inspection pursuant to the limited consent of the respondents. (Record, 567, 576, 631.) But IRS refused to disclose the more complete TDA file of the Church in the absence of respondents' consent. (Record, 569-570.) Petitioners' motion to compel respondents to consent to disclosure of that file was therefore filed January 16, 1979, after informal attempts to obtain their consent wholly failed.

Obviously, the motion to compel (Record, 872) is not frivolous on its face. And, in light of the circumstances set forth above, the motion is not wholly and plainly devoid of merit or without any support in reason. The motion is not without foundation, color or semblance of merit. Its underlying theory is not frivolous.[1]

[1]A motion requiring the IRS to itemize documents when plaintiff was able to examine the documents themselves, for example, is a frivolous motion. *Barney v. IRS*, 618 F.2d 1268, 1274 (8th Cir. 1980). A motion to have the IRS audited is patently frivolous. *Kelley v. United States*, 536 F.2d 897, 899 (9th Cir. 1976). And motions involving mooted claims or claims precluded by res judicata are legally frivolous. *Browning Debenture Holders Committee v. DASA Corp.*, 605 F.2d 35 (2d Cir. 1978).

Respondents' oppostion to the motion presented a bona fide factual issue, *i.e.*, whether all the tax records requested had been disclosed, which is not plainly frivolous or completely irrelevant. One of the issues relied on by the trial judge as a genuine issue of fact in denying the motion for summary judgment (Record, 861) was whether the Church is liable for the delinquent taxes. The respondents argued that the Church is not liable because the day care center was a separate entity. Yet the occupancy permit to operate the day care center, issued by the District of Columbia licensing authority to the Church, shows on its face that the day care center operated on Church premises is wholly owned by the Church. (Record, 809-810.)

With notices of Federal tax liens on file in the recorder's office, and absence of the Church's books of account, petitioners should have been afforded the opportunity to reconstruct a portion of the Church's income and expenses from tax return information. Moreover petitioners had a right to know whether duplicate assessments had been made against the Church, and whether the IRS intended to write off any part of the liability as uncollectible. But the right was arbitrarily denied by the questioned procedure followed by the trial judge.

Since the motion to compel respondent's consent to disclosure of the Church's TDA file was not patently frivolous, the motion should have been determined on the merits prior to any determination to order an involuntary dismissal for failure to prosecute. Had the motion been determined on the merits, either for or against petitioners, the *sua sponte* dismissal in question would have no basis in law or fact because the alleged 9-month period of prosecutorial inactivity, relied on by the trial judge, would have been reduced to three months.

Thus, petitioners submit that in mooting the motion by the involuntary dismissal of the complaint, the trial court departed from the accepted and usual course of judicial proceedings and denied petitioners their day in court.[2] Sanction of the procedure by the court below calls for an exercise of this Court's power of supervision.

Respondents argue that "[t]here is not a significant federal question nor are there any rights needing protection." (Brief, 6.) Petitioners submit, on the contrary, that the issue—of whether Rule 41(b) of the Federal Rules of Civil Procedure (which by law is binding on the courts below) authorizes mooting a discovery motion (that has been pending determination for a period of six months) by the involuntary dismissal of the claim—presents a substantial federal question respecting a substantial federal right, *viz.*, the right to sue, including the right to equal access to justice. Petitioners submit that there is no authority in Rule 41(b) or any other rule for a trial court—unable to determine a discovery motion for a period of six months—to *sua sponte* dismiss the case on theground of a 9-month delay in prosecuting it. *Cf. Sibron v. New York,* 392 U.S. 40, 53 (1968), where the state's argument that a convict's case was mooted by his failure to timely appeal was rejected because the state had denied the convict access to the appellate courts, and thus review by the federal courts, until he had been released.

2. Respondents' counterstatement of the issue presented by the petition, if accepted, demonstrates that petitioners' right of procedural due process was indeed denied by the trial judge's requirement that petitioners prove their fraud allega-

[2]The determination that a motion is frivolous embraces the conclusion that it is prosecuted for delay. Petitioners' good-faith reason for prosecuting the motion would have been ascertained at a hearing thereon.

tion prior to trial and by affirmance of that procedure by the court below.

Respondents state that the single question presented here is whether the trial judge abused his discretion in dismissing the complaint, *sua sponte,* upon finding that petitioners made no showing of wrongdoing on the part of respondents prior to trial, and that petitioners failed, "upon repeated informal requests and an [oral] order of the court to make such a showing."

The complaint (Record, 778) alleges a real and substantial (not merely colorable) claim for an accounting. Ostensibly, the respondents agreed since the case was determined to be complex and classified as a Civil I case upon respondents' motion.

The question of whether petitioners were entitled to entry of an order to account based on the fiduciary relation existing between the parties is the primary issue in the case. The alleged fraud, though important, is a secondary issue and separate ground for recovery. Consequently, the requirement of the trial judge that petitioners prove the alleged fraud prior to trial under the pain and penalty of dismissal of their claim for an accounting effectively denied petitioners of their right to a trial of that issue.

The purpose of pretrial proceedings is "to define the claims and defenses of the parties for purposes of eliminating unnecessary proof and issues and thereby expediting the trial." Thus, "pretrial proceedings are designed to complement the trial function and should not be used to invade that function by resolving issues of fact." *McBryde v. Amoco Oil Co.,* 404 A.2d 201, 203 (D.C. App. 1979).

The court below abandoned this announced principle in affirming the procedure in issue on this petition.

3. Finally, in a footnote, the court below, misapprehending the facts and applicable law, indicated that petitioner Charles E. Williams lacked standing to sue because he had been "voted out of the church." (Petition, 3b.) Even though the Church did, on an irregular occasion, vote to withdraw fellowship, the congregation never in fact withdrew petitioner's right to participate in the Eucharist or communion, prayers, and other religious exercises of the communing fellowship. Under the discipline and the law, petitioner's right to participate in the general corporate membership meetings was not affected by the vote to withdraw fellowship. The parties agreed that Hiscox, *The New Directory for Baptist Churches,* and *Robert's Rules of Order* form the basis of the discipline of the Mt. Jezreel Baptist Church. (Record, 934, ¶ 7.) Under Hiscox, the congregation consists of two official bodies—the Church or communing fellowship and the society or corporate body. While one body exists within the pale of the other, the corporate body and the communing fellowship are in no respect correlative. 66 AM. JUR.2d, *Religious Societies* §5 (1973).

> Where the church and the corporation set up to manage is business affairs exist as separate entities, membership in one is not identical with membership in the other. In this regard, it has been held that neither of these organizations has any power to expel a member from the other. [*Id.* §9.]

Cf. Bouldin v. Alexander, 15 Wall. (82 U.S.) 131, 140 (1873), where this Court held that excommunication of trustees from the communing fellowship at an irregular meeting of the Third Baptist Church [in the District of Columbia] did not disqualify them as trustees of the corporate body, and that they would not have been disqualified had the excision been regular. Hiscox adopts that principle.

Jurisdiction and standing are alleged in the verified amended complaint (Record, 779) as follows:

> 1. Jurisdiction of this Court is founded on *D.C. Code Ann.* §11-921(a)(6) (1973 ed.).
>
> 2. The Mt. Jezreel Baptist Church is a religious society or congregation organized in 1883 under the general incorporation law for the District of Columbia, ... *D.C. Code Ann.* § §29-501 thru 29-516 (1973 ed.). The discipline states that the congregation or "corporate body is a *society* composed of all attendants who are regular contributors, whether members of the Church or not." Hiscox, *New Directory for Baptist Churches,* p. 117.
>
> 3. Plaintiffs are citizens resident in the District of Columbia or nearby Maryland as indicated above. Charles E. Williams has been an attendant and regular contributor to the Church continuously since 1966. All other plaintiffs have been communicants of the Church in good standing continuously for periods of between 20 and 40 years. As such, plaintiffs fairly and adequately represent members of the congregation similarly situated in enforcing their rights and the right of the corporate body to an accounting and other relief.

At the pretrial conference, respondents' counsel stated that he had no objection to referral of the case to the court auditor if the petitioners would bear the costs. However, he argued that the court ought to dispose of the preliminary questions regarding the standing of four plaintiffs (not including petitioner Lorraine A. Williams) to sue for an accounting and act as class agents, as well as the legal sufficiency of the complaint as to those trustees who had been elected to office in December of 1976 after the periods subject to audit examination. The court replied that the proper way to raise questions of standing and personal jurisdiction is by motion and stated that case would not be

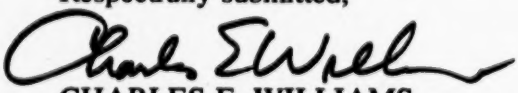
referred to the auditor until the preliminary matters had been disposed of upon motions to be filed by the respondents to which petitioners would timely respond. But respondents never filed the motions. (Record, 921, pars. 15, 17.)

The issue of standing is usually decided on the pleadings, "Normally, mere allegations will suffice" to establish standing, "but, if controverted by the defendant, the plaintiff must demonstrate facts supporting his allegations." *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714, note 22 (D.C. Cir. 1977). But, as indicated, respondents failed to controvert the verified allegations of standing. Consequently, the tentative conclusion of the court below relative to standing is without evidentiary support. Such a conclusion is the final example of the departure from the accepted and usual course of judicial proceedings.

CONCLUSION

For the foregoing reasons, and those stated in the petition, petitioners respectfully pray that the relief prayed for in the petition for review by certiorari be granted.

Respectfully submitted,



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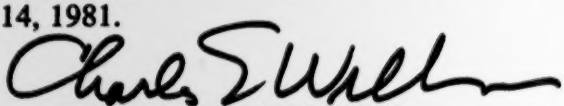
August, 1981

CERTIFICATE OF SERVICE

I certify that four copies of the foregoing reply brief were served upon counsel of record for the respondents, Blaine P. Friedlander, Esq., Suite 309, Mosby Building, 10560 Main Street, Fairfax, VA 22030, by certified mail No. P02 6100055, on August 14, 1981.



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